

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

LIUBYM GERASYMENKO,

Plaintiff,

-against-

SYMBION POWER SERVICES U.S., INC., et  
al.,

Defendants.

23-cv-5612 (AS)

ORDER OF DISMISSAL

ARUN SUBRAMANIAN, United States District Judge:

“[S]ubject matter jurisdiction is an unwaivable *sine qua non* for the exercise of federal judicial power.” *Curley v. Brignoli, Curley & Roberts Assoc.*, 915 F.2d 81, 83 (2d Cir. 1990). The Court is therefore “entitled at any time *sua sponte* to delve into the issue of whether there is a factual basis to support the ... exercise of subject matter jurisdiction.” *Transatlantic Marine Claims Agency, Inc. v. Ace Shipping Corp., Div. of Ace Young Inc.*, 109 F.3d 105, 108 (2d Cir. 1997).

On June 30, 2023, Plaintiff filed this case, in which he invoked the Court’s subject-matter jurisdiction pursuant to 28 U.S.C. § 1332. *See* Dkt. 1 ¶ 18. The complaint alleges that Gerasymenko is a “lawful permanent resident of the United States residing in the State of North Carolina.” ¶ 5. Several of the Defendants in this case are non-resident aliens. ¶¶ 9, 11, 12.

On December 8, 2023, the Court held a hearing in this matter. The Court advised the parties that there appeared to be a jurisdictional defect: “section 1332(a)(2) does not give the district court jurisdiction over a suit by a permanent resident against a non-resident alien.” *Tagger v. Strauss Grp. Ltd.*, 951 F.3d 124, 127 (2d Cir. 2020); *see also Universal Licensing Corp. v. Paola del Lungo S.p.A.*, 293 F.3d 579, 581 (2d Cir. 2002) (“[D]iversity is lacking within the meaning of these sections where the only parties are foreign entities, or where on one side there are citizens and aliens and on the opposite side there are only aliens”). The Court ordered Gerasymenko to file a letter indicating whether there was any basis for this Court to exercise jurisdiction and, if not, whether he would prefer to dismiss certain defendants or pursue the case in state court.

On December 12, 2023, Gerasymenko filed a letter indicated that he “intends to pursue all currently-named defendants in one action and will refile in state court” so “has no objection to the Court entering an order dismissing the current action without prejudice for lack of subject-matter jurisdiction.” Dkt. 83.

Accordingly, the complaint is hereby DISMISSED without prejudice for lack of subject matter jurisdiction. Any pending motions are denied as moot and any conferences are canceled. The Clerk of Court is directed to close the case.

SO ORDERED.

Dated: December 12, 2023  
New York, New York

A handwritten signature in black ink, appearing to read 'Arun Subramanian', is written over a horizontal line.

ARUN SUBRAMANIAN  
United States District Judge